Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-1031

SOUTHWEST TEXAS METHODIST HOSPITAL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. _____

SOUTHWEST TEXAS METHODIST HOSPITAL,

Petitioner,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on October 1, 1979.

OPINION BELOW

The opinion of the United States District Court for the Western District of Texas, San Antonio Division, is printed in Appendix C. The opinion of the Court of Appeals for the

Fifth Circuit is printed in Appendix B and reported at 606 F.2d 63. The Order of the Court of Appeals denying rehearing is printed in Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on September 4, 1979. Petitioner sought rehearing, which was denied on October 1, 1979. Copies of the above decisions are appended to this petition in Appendix B. pp. 14 - 15. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

In a suit under the Civil Rights Act of 1964, as amended, by the Equal Employment Opportunity Commission, Petitioner sought Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure on the basis that no genuine, material issue of fact existed and that Petitioner was entitled to judgment as a matter of law. The Equal

Employment Opportunity Commission opposed Petitioner's claim in the District Court through affidavits and exhibits purporting to raise a genuine issue of material fact. The United States District Court for the Western District of Texas, San Antonio Division, granted Petitioner's Motion For Summary Judgment. The Court of Appeals reversed and remanded the proceeding to the District Court. Petitioner sought rehearing of the Court of Appeals decision, which was denied. The question presented is:

Whether the Court of Appeals decision reversing Summary Judgment can be sustained in light of well-established precedent calling for the summary disposition of proceedings in which the party opposing summary judgment has failed to controvert the movant's showing that genuine, factual issues are lacking.

STATUTES AND FEDERAL RULES INVOLVED

The pertinent portions of 42 USC §2000(e), et. seq., Rule 56 of the Federal Rules of Civil Procedure, and Rules 802 and 901 of the Federal Rules of Evidence are set forth in Appendix D at pp. 17 - 21.

STATEMENT

This action was commenced under Title VII of the Civil Rights Act of 1964, as amended, as a result of Petitioner's refusal to hire a female job applicant (Tarpley) and from its alleged maintenance of separate job classifications for males and females in a department within its overall Hospital facility. In September, 1975, Tarpley applied for a position as a nurses aide but was not accepted for employment in this or any other capacity. On September 30, 1975, Tarpley filed a charge of sex discrimination with the Equal Employment Opportunity Commission; on June 17, 1976, the Commission issued a

determination in which it stated that there was reasonable cause to believe that Petitioner had discriminated against Tarpley. Subsequent conciliation efforts by the parties were unsuccessful and the Commission instituted this suit in the Western District of Texas, San Antonio Division, seeking individual and injunctive relief.

Tarpley thereafter entered into a settlement agreement with Petitioner. Petitioner subsequently moved under Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment on the remaining issues. Respondent opposed Petitioner's motion and submitted affidavits and exhibits in support of its position.

On November 30, 1978, the District Court granted Petitioner's Motion for Summary Judgment. On appeal, the Court of Appeals reversed. The Court briefly

recited Respondent's pleading allegations and its opposing affidavits and exhibits as support for its conclusion that the District Court improperly granted summary judgment in the face of a genuine and material issue. Petitioner sought rehearing before the Court of Appeals, contending that fundamental defects in Respondent's controverting affidavits and exhibits made summary judgment in the District Court proper. Petitioner's motion was denied without explanation on October 1, 1979.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets the requirements of Rule 56 of the Federal Rules of Civil Procedure so as to preclude summary disposition of proceedings in which the pleadings, affidavits and materials properly before the Court show that no genuine, material issues exist. The question presented herein is of importance

in the administration of the Federal Courts and the proper utilization of summary judgment as an important judicial tool for the orderly disposition of cases where no claim exists as a matter of law.

The decision below is in conflict with the decision of this Court in Associated Press v. U. S., 326 U.S. 1, reh. denied, 326 U.S. 802 (1945). In Associated Press, supra, this Court held that summary judgment is appropriate where the pleadings, affidavits, and materials properly before the Court show that no genuine, material issues exist. See also Dow Chemical Co., Inc. v. Ashland Oil, Inc., 579 F.2d 902, 904 (5th Cir. 1978). Where a party seeking summary judgment has supported its motion by a showing that genuine issues are lacking, it becomes incumbent upon the non-moving party to demonstrate that factual contentions do exist; where a party opposing summary judgment fails to meet this burden, this

this Court has held summary judgment proper. Associated Press, supra. E.C. Ernst, Inc. v. General Motors, 482 F.2d 1645 (5th Cir. 1973).

Rule 56(e) of the Federal Rules of Civil Procedure requires that:

> . . . opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn and certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto . . . when a motion for summary judgment is made in support as provided by this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings but his response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

While Petitioner recognizes that Courts may scrutinize the movants papers more closely

than those of the party opposing summary judgment, U.S. for Use of Austin v. Western Electric Co., 337 F.2d 568 (9th Cir. 1964), the requirements of Rule 56(e) set forth above cannot be abrogated for any party, Applegate v. Top Associates, Inc., 425 F.2d 92 (2nd Cir. 1979) without a resulting miscarrige of justice and denigration of the summary judgment process.

The Courts have long held that Rule 56 affidavits must be based upon personal knowledge and affirmatively show the same. Davis v. Howard, 561 F.2d 565 (5th Cir. 1977). See Eschaide v. Confederation of Canada Life Ins., 459 F.2d 1377, 1381 n. 5 (5th Cir. 1972). No where in Respondent's opposing affidavit is there any indication that the affiant had such knowledge of the statements and contentions made therein or that said evidence would otherwise be admissible as non-hearsay testimony under the Federal Rules of Evidence. See Broadway

v. City of Montgomery, Alabama, 530 F.2d 657 (5th Cir. 1976).

Respondent submitted as attachments to the above affidavit certain exhibits to rebut Petitioner's Motion for Summary Judgment. However, these documents were neither sworn to nor certified by the affiant as required by Rule 56(e). U.S. v. Dibble, 429 F.2d 498 (9th Cir. 1970). As such, they constitute inadmissible hearsay evidence as defined by Rule 801 of the Federal Rules of Evidence. In addition, said exhibits were neither authenticated nor otherwise identified in compliance with the requirements for admissibility set forth in Rule 901 of the Federal Rules of Evidence.

The District Court properly granted Summary Judgment in light of such fundamental defects in Respondent's opposing affidavit and exhibits, since Respondent had failed to properly meet its burden to rebut Petitioner's evidence or show the existence of a genuine,

material factual issue. Associated Press, supra. Central Oil & Supply Corp. v. U.S., 557 F.2d 511 (5th Cir. 1977). See Sagers v. Yellow Freight System, 529 F.2d 721, 726 (5th Cir. 1976). The direct reliance by the Court below on Respondent's defective affidavit and exhibits in reversing summary judgment is clearly not a case of "harmless error" precluding examination and reversal by this Court. Person v. U.S., 112 F.2d 1 (8th Cir.), cert. denied, 311 U.S. 672 U.S. (1940). The District Court's decision granting Summary Judgment was based in part upon a review and determination regarding the Respondent's controverting affidavit and exhibits. The Court of Appeals explicit reliance upon these improper evidenciary materials for its reversal decision, where no other basis for reversal existed or was stated by the Court, clearly exceeds the permissible bounds of judicial discretion

and resulted in a miscarriage of justice against the Petitioner. Noblett v. General Electric Credit Corp., 400 F.2d 442, 445 (10th Cir.) cert. denied, 393 U.S. 935 (1968).

It is respectfully submitted that this Court should exercise its power of supervision over the administration over the Federal Courts and determine whether summary judgment under Rule 56 is appropriate where the nonmoving party has failed to properly controvert the movants showing that genuine, material issues are lacking.

CONCLUSION

For the reason set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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Of Counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-1345

U.S. COURT OF APPEALS
FILED
OCT 1 1979
GILBERT E. GANUCHEAU
CLERK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

versus

SOUTHWEST TEXAS METHODIST HOSPITAL,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(October 1, 1979)

Before AINSWORTH, GODBOLD and VANCE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied

ENTERED FOR THE COURT:

John C. Ainsworth
United States Circuit Judge

Form 703-2

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant,

v.

SOUTHWEST TEXAS METHODIST HOSPITAL, Defendant-Appellee.

No. 79-1345
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

Sept. 4, 1979.

EEOC brought suit against employer alleging that it violated Title VII of Civil Rights Act of 1964 by refusing to hire female because of her sex and by maintaining separate job classifications for males and females. The United States District Court for the Western District of Texas, John H. Wood, Jr., J., granted employer's motion for summary judgment, and appeal was taken. The Court of Appeals held that genuine issue of material fact existed as to whether employer maintained unlawful sex-segregated job classifications, precluding summary judgment.

Vacated and remanded.

1. Federal Civil Procedure ⇐2497

In Title VII action brought by EEOC against employer, genuine issue of material fact existed as to whether employer maintained unlawful sex-segregated job classifications, precluding summary judgment. Civil Rights Act of 1964, §§ 701 et seq., 706(e–g) as amended 42 U.S.C.A. §§ 2000e et seq., 2000e–5(f)(1, 3), (g); Fed.Rules Civ.Proc. rule 56(c), 28 U.S.C.A.

2. Federal Civil Procedure ⇐2497

When dealing with employment discrimination cases, which usually necessarily involve examining motive and intent, granting of summary judgment is especially questionable. Fed.Rules Civ. Proc. rule 56(c), 28 U.S.C.A.

Appeal from the United States District Court for the Western District of Texas.

Before AINSWORTH, GODBOLD and VANCE, Circuit Judges.

PER CURIAM:

The Equal Employment Opportunity Commission (EEOC) brought this suit against Southwest Texas Methodist Hospital (Southwest) alleging that Southwest violated Section 706(f)(1), (3) and (g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, by refusing to hire Ann Tarpley as a Dietary Porter because of her sex, and by maintaining separate job classifications for males and females in its Dietary Department. The district court granted Southwest's motion for summary judgment, and though not required to do so, assigned no reasons for his action which might have assisted this court in reaching a decision.

After EEOC filed its suit, the parties obtained a stay of the proceedings in

*** Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.**

order to permit negotiations to resolve the suit. Ann Tarpley, represented by private counsel entered into a settlement with Southwest and released the hospital with regard to her individual claim. EEOC was not a party to this settlement. Both parties agree that Ann Tarpley's settlement preclude EEOC from urging any claim on her behalf. EEOC appeals the judgment on the outstanding issue of Southwest's alleged sex-segregated job classifications.

EEOC contends that granting of summary judgment in favor of Southwest was inappropriate since there exist genuine issues of material fact as to whether Southwest maintains unlawful sex-segregated job classifications. *See* Fed.R. Civ.P. 56(c). EEOC alleges that Southwest intentionally engaged in a pattern of sexual discrimination by maintaining separate job classifications for men and women in that as of June 30, 1978, no women were employed as Dietary Porters, and that between September 1, 1975 and December 31, 1975, Southwest hired nine men and no women, as Dietary Porters and eight women, but no men, as Dietary Aides. EEOC further alleges, with supporting affidavits and statistical data, that Ann Tarpley, who applied for a position as Dietary Porter, was not hired on the basis of her sex and was told by an employee of Southwest that Dietary Porter positions were reserved solely for men. Southwest responds by affidavits, documents and other materials that it maintains an official policy of providing equal employment opportunities to all qualified individuals without regard to sex, that its job categories for the positions in question are sexually neutral, and that approximately three-quarters of its work force are women, a percentage in excess of the available female work force in the San Antonio area.

. [1, 2] It appears, therefore, that there are genuine issues of material fact to be tried by the court, and thus that this was not a proper case for disposition by summary judgment. As this court stated recently, "[w]hen dealing with employment discrimination cases, which usually necessarily involve examining motive and intent . . ., granting of summary judgment is especially questionable." *Hayden v. First National Bank of Mt. Pleasant, Texas*, 5 Cir., 1979, 595 F.2d 994, 997. A full hearing on the merits is, therefore, necessary under the circumstances here.

Accordingly, the judgment is vacated and the case is remanded to the district court for further proceedings.

VACATED AND REMANDED.

FILED NOV 30 1978
Clerk
By Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, §
§
Plaintiff, §
§
VS. § CIVIL ACTION NO.
§ SA-78-CA-109
SOUTHWEST TEXAS METHODIST HOSPITAL, §
§
Defendant. §

ORDER GRANTING MOTION TO DISMISS
AND/OR FOR SUMMARY JUDGMENT

On this 30th day of November, 1978, came to be considered the Motion To Dismiss and/or For Summary Judgment filed by Defendant, Southwest Texas Methodist Hospital, in the above entitled and numbered cause. The Court having considered said motion together with the other pleadings and instruments on file in this action, is of the opinion that the same should in all things be granted, it is accordingly,

ORDERED, ADJUDGED AND DECREED that Defendant's Motion To Dismiss and/or For Summary Judgment is hereby GRANTED.

DATED this 30th day of November, 1978.

UNITED STATES DISTRICT JUDGE
JOHN H. WOOD, JR.

Rule 802.

HEARSAY RULE

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 901.

REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Rule 56.

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief

Supreme Court, U. S.
FILED
FEB 27 1980
MICHAEL RODAK, JR., CLERK

No. 79-1031

In the Supreme Court of the United States

OCTOBER TERM, 1979

SOUTHWEST TEXAS METHODIST HOSPITAL,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1031

SOUTHWEST TEXAS METHODIST HOSPITAL,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 606 F. 2d 63. The order of the district court (Pet. App. C) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1979. A timely petition for rehearing was denied on October 1, 1979 (Pet. App. A). The petition for a writ of certiorari was filed on Monday, December 31, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly concluded that summary judgment should not be entered in this case because material facts remain in genuine dispute.

STATEMENT

On March 27, 1978, the Equal Employment Opportunity Commission filed this employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The complaint alleges that Southwest Texas Methodist Hospital has unlawfully maintained sex-based job classifications by hiring only women as dietary aides and only men as dietary porters. The complaint further alleges that the hospital unlawfully refused to hire Ms. Ann Tarpley as a dietary porter because of her sex.

After this action was filed, Ms. Tarpley entered into a settlement of her individual claim with the hospital (Pet. App. B 15). Further negotiations between the hospital and the Commission, however, failed to resolve the outstanding claim that the hospital maintained unlawful sex-segregated job classifications. Before discovery on this claim was completed, the hospital filed a motion to dismiss or for summary judgment. The district court thereafter stayed further discovery pending disposition of the motion.

In support of its motion for summary judgment, the hospital filed an affidavit stating that the hospital's official policy is to provide equal employment opportunities for all individuals without regard to sex. The hospital also filed copies of written job descriptions for the positions in question and an affidavit stating that women comprised approximately 75% of the hospital's total workforce (Pet. App. B 15).

The Commission responded to the motion with an affidavit by an EEOC attorney that summarized certain records obtained from the hospital. These records were

attached as exhibits to the affidavit.[1] The exhibits, which were not challenged in the courts below, revealed (1) that, at the time Ms. Tarpley applied for a position as a dietary porter, there were three vacancies; (2) that each of these vacancies was eventually filled by a man; and (3) that between September 1, 1975, and December 31, 1975, the hospital hired nine "Dietary Porters", all of whom were men, and eight "Dietary Aides", all of whom were women. The records also showed that, as late as June 30, 1978, all persons employed in the "Dietary Porter" classification were men. The Commission also submitted an affidavit from Ms. Tarpley stating that, when she applied for a job, she had been advised by a hospital employee in the personnel department that the "Dietary Porter" position was for males only (Pet. App. B 15).

The district court issued an order granting the hospital's "Motion To Dismiss and/or For Summary Judgment" (Pet. App. C). The court gave no explanation for its order.

The court of appeals, after summarizing the evidence in the record, reversed the award of summary judgment. The court held that the record revealed that there are genuine issues of material fact as to whether the hospital maintained sex-segregated job classifications and that "[a] full hearing on the merits is, therefore, necessary * * *" (Pet. App. B 15).

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[1]The affidavit identifies the exhibits as the hospital's records. The hospital, in its brief in the court of appeals, conceded that these records had been provided by the hospital to the Commission during settlement negotiations after suit was brought (Appellee's Br. 22 n.5; see also *id.* at 21).

ARGUMENT

The decision of the court of appeals properly applies established principles of law to the facts of this case. Further review is therefore unwarranted.

1. It is, of course, well settled that a motion for summary judgment must be denied if material issues of fact remain in genuine dispute. *E.g.*, *Poller* v. *Columbia Broadcasting, Inc.*, 368 U.S. 464, 467 (1962); *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944). The question whether the court of appeals correctly determined that material issues of fact remain in genuine dispute in this case is not of sufficient importance to merit further review.

2. In any event, the court of appeals correctly concluded that material facts remain in dispute. The affidavits submitted by the hospital in the district court purport to establish only that the hospital has a policy of neutrality and that it in fact hires more women than men. But these assertions do little to rebut the allegation of the complaint, which is that the hospital hires only men as dietary porters and only women as dietary aides.

The Commission's affidavits, moreover, indicate that the hospital has pursued a sex-segregated course of hiring for several years, hiring only men as dietary porters and only women as dietary aides. The affidavit of Ms. Tarpley buttresses this statistical evidence, for she states that a hospital official informed her that the dietary porter position was reserved for men only (Pet. App. B 15). The information in these affidavits is sufficient to establish a genuine dispute as to whether the hospital has engaged in sex discrimination in violation of Title VII. Petitioner thus has not carried its burden of showing that there are no material facts remaining in dispute. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 159-160 (1970).

Petitioner contends that the affidavits and exhibits filed by the EEOC in opposition to the motion for summary judgment should not have been considered by the court of appeals because one of the affidavits was not based on personal knowledge and the exhibits were not sworn to or identified as required by Fed. R. Civ. P. 56. Because this contention was not raised in either court below, it is not properly presented for review by this Court. *Miree* v. *DeKalb County*, 433 U.S. 25, 33-34 (1977); *Adickes* v. *S.H. Kress & Co.*, *supra*, 398 U.S. at 147 n.2; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958). Moreover, petitioner's failure to question the technical compliance of these documents with Rule 56 during the proceedings before the district court constitutes a waiver of that objection.[2] In any event, the hospital conceded in the court of appeals that the exhibits attached to the EEOC affidavit were part of the materials provided to the Commission by the hospital during settlement negotiations. See pages 2-3, *supra*. These authenticated exhibits, plus the affidavit of Ms. Tarpley based on her personal knowledge, are sufficient to establish that a genuine dispute of material facts continues to exist in this case.

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[2]Absent a timely objection under Rule 56(e) in the district court, formal defects in materials submitted on a summary judgment motion are waived, and the unchallenged materials may be considered by the court. See, *e.g.*, *Lacey* v. *Lumber Mutual Fire Insurance Co.*, 554 F. 2d 1204, 1205 (1st Cir. 1977); *Noblett* v. *General Electric Credit Corp.*, 400 F. 2d 442, 445 (10th Cir.), cert. denied, 393 U.S. 935 (1968); *Auto Drive-Away Co.* v. *Interstate Commerce Commission*, 360 F. 2d 446, 448-449 (5th Cir. 1966); *Chambers* v. *United States*, 357 F. 2d 224, 228 & n.3 (8th Cir. 1966); *United States for the Use and Benefit of Austin* v. *Western Electric Co.*, 337 F. 2d 568, 575 (9th Cir. 1964); *Klingman* v. *National Indemnity Co.*, 317 F. 2d 850, 854 (7th Cir. 1963).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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